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Nos. 81-746, 81-854

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

CITY OF AKRON, et al.,
Petitioners,
vs.
AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., et al.,
Respondents

FRANCOIS SEGUIN, et al.,
Petitioners,
vs.
AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., et al.,
and
CITY OF AKRON, et al.,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' CONSOLIDATED BRIEF IN OPPOSITION TO CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court should abandon the constitutional test it established in Roe v. Wade, 410 U.S. 113 (1973), to assess the constitutionality of regulations restricting abortions.

2. Whether a regulation (Section 1870.05 (B)) vesting parents or judicial officers with an absolute veto of the abortion decision and mandating, in conjunction with Ohio Revised Code Chapter 2151, parental notification in the case of every woman under the age of fifteen regardless of her best interests or maturity, is unconstitutional.

3. Whether an inflexible regulation (Section 1870.06(B)) mandating that the physician, upon threat of criminal penalty, recite to every patient seeking an abortion at least 44 lines of printed material including medically inaccurate, biased, and irrelevant information, is unconstitutional.

4. Whether an inflexible and procedurally vague regulation (Section 1870.06(C)) mandating that the "attending physician" upon threat of criminal penalty, in every case personally provide an oral recitation of risk and technique details to each woman seeking an abortion, is unconstitutional because it imposes severe psychological and economic burdens on women seeking abortions in Akron, Ohio.

5. Whether an inflexible regulation (Section 1870.07) mandating that every woman seeking an abortion wait at least twenty-four hours after she has signed an informed consent document before she can obtain an abortion, is unconstitutional because it imposes severe physical, psychological and economic burdens on women seeking abortions in Akron, Ohio.

6. Whether a regulation (Section 1870.16) mandating that fetuses be

disposed of in a "humane" manner is unconstitutionally vague.

PARTIES

The defendant City of Akron has failed to noté in its petition that the Mayor of Akron, the Director of Public Health of Akron and the Police Prosecutor of Akron are all parties to the present proceeding. All these public officials were named as defendants in the complaint filed in the District Court and pursuant to Supreme Court Rule 19.6 they remain parties to this proceeding.

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STATUTORY PROVISIONS INVOLVED

The City of Akron Ordinance involved is Ordinance Number 160-1978 (hereinafter referred to by its Akron Codified Ordinance designation, Chapter 1870). It provides in pertinent part:

CHAPTER 1870

* * *

1870.05 NOTICE AND CONSENT

(A) No physician shall perform or induce an abortion upon an unmarried pregnant woman under the age of 18 years without first having given at least twenty-four (24) hours actual notice to one of the parents or the legal guardian of the minor pregnant woman as to the intention to perform such abortion, or if such parent or guardian cannot be reached after a reasonable effort to find him or her, without first having given at least seventy-two (72) hours constructive notice to one of the parents or the legal guardian of the minor pregnant woman by certified mail to the last known address of one of the parents or guardian, computed from the time of mailing, unless the abortion is ordered by a court having jurisdiction over such minor pregnant woman.

(B) No physician shall perform or induce an abortion upon a minor pregnant woman under the age of fifteen (15) years without first having obtained the informed written consent of the minor pregnant woman in accordance with Section 1870.06 of this Chapter, and

(1) First having obtained the informed written consent of one of her parents or her legal guardian in accordance with Section 1870.06 of this Chapter, or

(2) The minor pregnant woman first having obtained an order from a court having jurisdiction over her that the abortion be performed or induced.

1870.06 INFORMED CONSENT

(A) An abortion otherwise permitted by law shall be performed or induced only with the informed written consent of the pregnant woman, and one of her parents or her legal guardian whose consent is required in accordance with Section 1870.05(B) of this Chapter, given freely and without coercion.

(B) In order to insure that the consent for an abortion is truly informed consent, an abortion shall be performed or induced upon a pregnant woman only after she, and one of her parents or her legal guardian whose consent is required in accordance with Section 1870.05 (B) of this Chapter, have been orally informed by her attending physician of the following facts, and have signed a consent form acknowledging that she, and the parent or legal guardian where applicable, have been informed as follows:

(1) That according to the best judgment of her attending physician she is pregnant.

(2) The number of weeks elapsed from the probable time of the conception of her unborn child, based upon the information provided by her as to the time of her last menstrual period or after a history and physical examination and appropriate laboratory tests.

(3) That the unborn child is a human life from the moment of conception and that there has been described in detail the anatomical and physiological characteristics of the particular unborn child at the gestational point of development at which time the abortion is to be performed, including, but not limited to, appearance, mobility, tactile sensitivity, including

pain, perception or response, brain and heart function, the presence of internal organs and the presence of external members.

(4) That her unborn child may be viable, and thus capable of surviving outside of her womb, if more than twenty-two (22) weeks have elapsed from the time of conception, and that her attending physician has a legal obligation to take all reasonable steps to preserve the life and health of her viable unborn child during the abortion.

(5) That abortion is a major surgical procedure which can result in serious complications, including hemorrhage, perforated uterus, infection, menstrual disturbances, sterility and miscarriage and prematurity in subsequent pregnancies; and that abortion may leave essentially unaffected or may worsen any existing psychological problems she may have, and can result in severe emotional disturbances.

(6) That numerous public and private agencies and services are available to provide her with birth control information, and that her physician will provide her with a list of such agencies and the services available if she so requests.

(7) That numerous public and private agencies and services are available to assist her during pregnancy and after the birth of her child, if she chooses not to have the abortion, whether she wishes to keep her child or place him or her for adoption, and that her physician will provide her with a list of such agencies and the services available if she so requests.

(C) At the same time the attending physician provides the information required by paragraph (B) of this Section, he shall, at least orally, inform the pregnant

woman, and one of her parents or her legal guardian whose consent is required in accordance with Section 1870.05(B) of this Chapter, of the particular risks associated with her own pregnancy and the abortion technique to be employed including providing her with at least a general description of the medical instructions to be followed subsequent to the abortion in order to insure her safe recovery, and shall in addition provide her with such other information which in his own medical judgment is relevant to her decision as to whether to have an abortion or carry her pregnancy to term.

(D) The attending physician performing or inducing the abortion shall provide the pregnant woman, or one of her parents or legal guardian signing the consent form where applicable, with a duplicate copy of the consent form signed by her, and one of her parents or her legal guardian where applicable, in accordance with Paragraph (B) of this Section.

1870.07 WAITING PERIOD

No physician shall perform or induce an abortion upon a pregnant woman until twenty-four (24) hours have elapsed from the time the pregnant woman, and one of her parents or her legal guardian whose consent is required in accordance with Section 1870.05(B) of this Chapter, have signed the consent form required by Section 1870.06 of this Chapter, and the physician so certifies in writing that such time has elapsed.

* * *

1870.16 DISPOSAL OF REMAINS

Any physician who shall perform or induce an abortion upon a pregnant woman shall insure that the remains of the unborn child are disposed of in a humane and sanitary manner.

* * *

1870.18 PENALTY

(A) Whoever violates Sections 1870.02, 1870.03, 1870.04, 1870.05, 1870.06, 1870.07, 1870.08, 1870.10, 1870.14, 1870.15 or 1870.17 of this Chapter shall be deemed guilty of a misdemeanor of the first degree and punished as provided for in Section 698.02 of the Codified Ordinances of the City of Akron, Ohio, 1975.

(B) Whoever violates any other provision of this Chapter shall be deemed guilty of a misdemeanor of the third degree and punished as provided for in Section 698.02 of the Codified Ordinances of the City of Akron, Ohio, 1975.

* * *

All other relevant statutory material may be found in the Appendix to the petition for writ of certiorari of the City of Akron (No. 81-746) except for the relevant sections of Chapter 3701-47 of the Ohio Administrative Code which provide as follows:

3701-47-01 Definitions

As used in rules 3701-47-01 to 3701-47-07 of the Ohio Sanitary Code;

* * *

(E) "Fetus" means the developing conceptus from fourteen (14) weeks after the first day of the woman's last menstrual period until birth.

* * *

3701-47-06 Counseling

(A) The fact of the availability of both pre-abortion and post-abortion counseling for herself and other persons of her choosing shall be made known by the physician, to each woman who is seeking the abortion of a fetus.

(B) Counseling shall be non-judgmental, regardless of the circumstances of the pregnancy, but shall not be forced upon the woman.

(C) The woman shall be treated in a safe, humane and dignified manner during the counseling period and throughout her stay at the place where the abortion is performed.

STATEMENT OF THE CASE

A. History of the Legislation

On February 28, 1978, the Akron City Council, by a vote of seven to six, enacted Chapter 1870, a nine page, 19 section, compendium of regulations restricting the availability of abortions in Akron, Ohio.[1]

The process by which Chapter 1870 was prepared was marked by drastic departures from normal legislative procedure. Chapter 1870 is one of only two bills enacted in an eleven year period over the objection of the City Law Department that the legislation was, in large measure, unconstitutional. (J.A. 321-323;

1. The legislation enacted was specifically intended by its drafters as a "national model." (Deposition of Marvin Weinberg August 2, 1978.) Chapter 1870 contains a variety of regulations inapplicable to Akron including a prohibition of abortions in municipal hospitals (Section 1870.13) despite the fact that Akron has no such facilities and no intention to acquire them. (Joint Appendix filed in the Court of Appeals at 391-392.)

393-394)[2] Chapter 1870 is the only bill submitted for City Council consideration within at least a three year span drafted by partisan advocates rather than the City Law Department. (J.A. 319) Chapter 1870 is the only legislation in recent memory to have been considered after ex parte hearings from which both the public and legislators opposed to the bill were excluded. (A.E. 72-74) Chapter 1870 is the only piece of legislation ever adopted by the City of Akron to regulate a medical or surgical procedure. Finally, Chapter 1870 was adopted despite statements by the Akron Director of Health, Akron Mayor and Summit County Medical Society that there

2. Unless otherwise noted, citations are to the Joint Appendix (J.A.) or Appendix of Exhibits (A.E.) submitted to the United States Court of Appeals for the Sixth Circuit in this case.

was no medical or health-related need for such legislation.[3]

B. History of the Litigation

The present litigation was commenced

3. C. William Keck, Director of Health of the Akron Department of Health, and a named defendant in this action, stated that the complication rate for Akron clinics is below the national average (A.E. 18), that the rate of major complications in Akron "could hardly be lower" (A.E. 19) and that there has never been a death related to the operation of the Akron clinics. (A.E. 18) His conclusion, based on this and other evidence, was "that from the point of view of protecting the health of the woman involved there is no compelling reason to regulate Akron's abortion facilities." (A.E. 20)

Dr. Charles Bowen, the ranking member of the Maternal and Infant Health Committee of the Summit County Medical Society, reviewed and audited the plaintiff clinics. (A.E. 43) His conclusion on behalf of the Summit County Medical Society was that "there is no medical need for an ordinance to be introduced." (A.E. 44)

John Ballard, the Mayor of the City of Akron, and a named defendant in this action, reached precisely the same conclusion. In a press statement released on March 8, 1978, the Mayor stated that there was "a failure to demonstrate that a need existed for . . . regulation." (A.E. 46)

on April 19, 1978, before the Honorable Leroy Contie, Jr., United States District Judge for the Northern District of Ohio, Eastern Division. Plaintiffs sought both injunctive and declaratory relief from the restrictions imposed by Chapter 1870. On April 28, 1978, a temporary restraining order was granted. On May 16, 1978, the District Court permitted intervenors to proceed in this action solely "in their individual capacity as parents of unmarried daughters of childbearing age." Akron Center for Reproductive Health v. City of Akron, 479 F.Supp 1172, 1181 (N.D. Ohio 1979). Trial on the merits took place from September 5 to September 19, 1978.

On August 22, 1979, the District Court issued its decision holding Sections 1870.05(A) and (B) (restricting the availability of abortions to all

minors), 1870.06(B) (substituting a script for the informed consent dialogue), 1870.09 (authorizing warrantless searches), and 1870.16 (requiring "humane" disposal of fetal remains) unconstitutional. It upheld a number of sections including 1870.06(C) (counseling exclusively by the attending physician) and 1870.07 (twenty-four hour delay). It determined that plaintiffs were without standing to challenge several other sections of the ordinance.

All parties appealed to the United States Court of Appeals for the Sixth Circuit.[4] As noted by the Court of

4. The precise scope of intervenors' appeal is unclear because they filed their appellate briefs as both amici and appellants. In November of 1979, intervenors, in a brief submitted to the District Court concerning the award of attorneys fees, described their intervention as being confined to "those issues surrounding Section 1870.05, Notice and Consent, and those portions of Section 1870.06, Informed Consent, providing for informed consent of parents or legal guardians." (J.A. 862)

Appeals, Akron Center for Reproductive Health v. City of Akron, 651 F.2d 1198, 1205 (6th Cir. 1981), defendants did not appeal the District Court's invalidation of Section 1870.05(A) and (B) (restricting the availability of abortions to all minors). Further, defendants specifically conceded that subsections (3), (4), and (5) of Section 1870.06(B) (substituting a script for the informed consent dialogue) were unconstitutional and requested that they be severed from the remainder of that section of the ordinance. Finally, while not conceding that Section 1870.06(C) (counseling exclusively by the attending physician) was vague, defendants and intervenors gave diametrically opposed interpretations of its meaning thereby substantiating plaintiffs' vagueness

claim.[5]

On June 12, 1981, the Court of Appeals affirmed the District Court determinations invalidating Sections 1870.05(B) (parental veto and mandatory notification for women under 15), 1870.06(B)(substituting a script for the informed consent dialogue) and 1870.16 ("humane"disposal). It reversed the District Court and held unconstitutional 1870.06(C) (counseling exclusively by the attending physician) and 1870.07 (twenty-four hour delay). The Court of Appeals also held that the District Court had used the wrong constitutional

5. Plaintiffs had asserted that Section 1870.06(C) was vague because it failed to inform the attending physician when to provide the mandated counseling. In defense of the section defendants asserted that the counseling had to be performed at least twenty-four hours in advance of the abortion. (Defendants' Brief of February 28, 1980 at 18) Intervenors reached precisely the opposite conclusion. (Intervenors' Brief of April 8, 1980 at 15)

standard in testing the various provisions of the ordinance. Finally, on the basis of H. L. v. Matheson 450 U.S. ____, 101 S. Ct. 1164 (1981), the Court of Appeals reversed, on standing grounds, the ruling of the District Court invalidating 1870.05(A) (requiring parental notification for minors 15-17).[6] Thereafter defendants and intervenors sought certiorari.

6. Circuit Judge Kennedy filed an opinion concurring in part and dissenting in part. She concluded that three of the five sections of the ordinance on which defendants and intervenors seek review were unconstitutional. (Section 1870.06(B) (script substituted for informed consent dialogue), Section 1870.07 (twenty-four hour delay), Section 1870.16 ("humane" disposal)) She urged the validation of one of the remaining two sections on standing grounds. (Section 1870.05(B) (parental veto and notification for women under 15)) Finally, she dissented on constitutional grounds only with respect to the invalidation of a single section. (1870.06(C) (requiring personal counseling by the attending physician)).

C. The Facts Presented Prove That the Restrictions at Issue Would Substantially Burden Women Seeking Abortions in Akron, Ohio

Defendants and intervenors request that this Court review the decision of the Sixth Circuit invalidating the five ordinance sections listed supra. One of the reasons why this Court should deny the writ is that these sections were invalidated on the basis of an extensive factual presentation heard by the District Court and reviewed by the Court of Appeals.[7]

1. Section 1870.05 (B), requiring parental or judicial consent and mandatory parental notification in the case of every minor under fifteen was proven to be unduly burdensome.

Detailed testimony was provided with respect to the impact of Ordinance

7. Plaintiffs presented 28 witnesses and 54 exhibits. Defendants and intervenors presented 17 witnesses and 18 exhibits. The trial record is well over 2,000 pages in length.

Section 1870.05(B) which cedes parents or judicial officers an absolute veto whenever women under fifteen years of age seek abortions and which in conjunction with Ohio Revised Code Chapter 2151, requires parental notification in all such cases regardless of the women's best interest or maturity. As the District Court noted, the intervenors have specifically conceded that notification is required in all cases. Akron Center for Reproductive Health v. City ofAkron, 479 F. Supp. at 1202.

The evidence adduced at trial demonstrated that the "veto and notification" rule is burdensome for a variety of reasons. Its existence will impede a significant number of young

women from seeking pregnancy-related medical care and will thereby increase the health risk they face. (J.A. 196-201,276-283) Some young women will be forced to seek care outside Akron (J.A.104-105, 201, 279), exposing them to the increased risks associated with travel and diminished opportunities for follow-up care. (J.A. 98-99, 382) For those who seek abortions in Akron the "veto and notification" rule will increase the risk of physical assault by abusive parents (J.A. 280), increase the likelihood of psychological injury (Id.), increase the risk of suicide attempts (Id.) and exacerbate the risk of destructive family strife. (J.A. 102, 200, 211, 280) The evidence also demonstrated that early abortion is far safer for young women than forced childbirth. (J.A. 194-195, 209-210, 274-275, 332-333, 339-343).

This criminal statute does not address any current problem or need because the vast majority of teenagers under fifteen have voluntarily involved their parents in the abortion decision and are accompanied by a parent to the Akron clinics. (J.A.119, 140, 152-153, 179, 228, 263,314-315, 476, 480-484.) A four month survey at plaintiff Akron Center for Reproductive Health indicated that 26 of 29 women 14 years of age came to the clinic with a parent, while each of the seven younger women who came in was thus accompanied. (J.A. 152-153) The primary reason why Akron women under 15 years of age have not, on occasion, involved their parents in the abortion decision-making process was described by Yvonne Bolitho, Director of Counseling at plaintiff Akron Center for Reproductive Health, "their concern was that additional physical abuse would occur if

the parents were knowledgeable of the abortion." (Transcript Volume III at 73-74)

The evidence further demonstrated that some women under fifteen are mature and can make the requisite medical decision when necessary. This was the view of Dr. Felix Heald, Professor of Pediatrics and Director of the Division of Adolescent Medicine at the University of Maryland School of Medicine (J.A. 201), Dr. Adele Hofmann, Professor of Pediatrics and Director of the Adolescent Medical Unit of the New York University Medical Center (J.A. 284,303), and of defendants' expert Dr. Jasper Williams. ("[S]ome kids at 14 are more mature than their parents and you have more trouble talking to the parents than the patient. "(J.A. 747))

2. Section 1870.06(B) setting forth 44 lines of information the attending physician must recite to every woman, would substantially burden women

seeking abortions in Akron and their physicians.

Section 1870.06(B) of the Akron ordinance inflexibly mandates that the physician, on threat of criminal penalty, recite in every case the information outlined in 44 lines of printed material (Appendix 121a-122a) to pregnant patients seeking abortions. Included in this material is a requirement that the physician provide a detailed description of the "anatomical and physiological characteristics of the particular unborn child," and that he state "that the unborn child is a human life from the moment of conception." The District Court found that this Section of the ordinance requires the recital of information that may be untrue and information that is unavailable to medical science. 479 F. Supp. at 1203. The inflexibility of Section 1870.06(B)

is its clearest and most injurious defect. It can cause psychological harm to patients and destroy the informed consent dialogue.[8] (J.A. 353, 359, 367-368) The evidence demonstrated other flaws as well. As noted by the District Court, these include an insistence that physicians provide information unavailable to medical science[9] and

8. Plaintiffs' witness, Dr. Jay Katz, of the Yale Medical and Law Schools testified that in 11 to 17 percent of all cases of medical treatment patients do not wish to hear a detailed recitation of risks or procedures. (J.A. 352-353) In the interest of preserving the patient's health, well-being and ability to make a rational decision it is sometimes necessary for the physician to exercise therapeutic privilege and dispense with such recitations. (Id.) This is as important in the abortion context as elsewhere. (J.A. 362-363) The State of Ohio specifically recognizes therapeutic privilege in Ohio Sanitary Code Section 3701-47-06 which requires that in all abortions after the fourteenth week from the last menstrual period "counseling ... shall not be forced upon the woman."

9. See, e.g., the testimony of plaintiffs' witness, Nobel laureate, Dr. Frederick Robbins, that despite the demand of subsection 1870.06(B)(3), science has no answer to the question whether a fetus at six weeks gestation feels pain. (J.A. 406)

that they make potentially misleading, threatening or unscientific declarations.[10] Other flaws include the requirements that physicians provide information to their patients before accurate data can be obtained;[11] and, that they provide data without any clearly delineated limitations.[12] Any

10. See, e.g., the testimony of plaintiffs' witness Dr. Christopher Tietze, one of the foremost population demographics and birth control experts in the United States, that despite the assertion of subsection 1870.06(B)(5) there is no evidence that early abortion increases the risk of sterility or later miscarriage. (J.A. 381)

11. For the physician performing menstrual extractions it is impossible, because of the early stage of the pregnancy, to flatly declare to the patient whether or not she is pregnant as required by subsection 1870.06(B)(1). See Planned Parenthood of Kansas City v. Ashcroft, 655 F.2d 848, 868-69 (8th Cir., 1981).

12. As the District Court noted in this case, subsection 1870.06(B)(3) requires a limitless recitation of fetal characteristics, by using the phrase "including, but not limited to..." 479 F. Supp. at 1203. The same problem is posed by subsections 1870.06(B)(6) and (7) which require the provision of limitless lists of counseling agencies. (Appendix 122a)

deviation from the requirements of this section may be punished as a first degree misdemeanor.

3. Section 1870.06(C) requiring that the "attending physician" personally inform each patient is psychologically and economically burdensome in Akron, Ohio, where there are few doctors who perform abortions.

Using a "rational basis" test, the District Court upheld Section 1870.06(C), requiring that the "attending physician"[13] personally, in every case inform his patient "of the particular risks associated with her own pregnancy

13. Nowhere in Chapter 1870 is the word "attending" defined. However, both defendants and intervenors have at all times interpreted the word to mean the same doctor who is to perform the abortion. See, e.g., material cited in note 5, supra. This distinguishes Section 1870.06(C) from the regulation upheld in Planned Parenthood Association of Kansas City v. Ashcroft, 655 F.2d 848 (8th Cir., 1981), where counseling had to be performed by a physician not "the" physician.

and the abortion technique to be employed." (Appendix 122A) In examining the same evidence, but using a stricter standard of review, the Court of Appeals concluded that this requirement directly interferes with the exercise of a woman's right to seek an abortion and is unconstitutional.

It was uncontested that the majority of women seeking abortions in Akron have been professionally counseled and have made up their minds with respect to the necessity for an abortion before they arrive at one of the Akron clinics.

(J.A. 140, 170, 225, 262-263, 314, 477, 512, 558, 735) Further the District Court specifically found that, except in cases of therapeutic concern, each patient is counseled at the Akron clinics, informed orally and in writing of the risks attendant to the abortion procedure, instructed in techniques of birth control, and provided aftercare instructions before an abortion is ever performed. 479 F. Supp. at 1181-1182.

The District Court also found that the attending physician at each procedure performed in one of the Akron clinics reviews each patient's medical chart with her (the charts contain information concerning counseling, medical history and desire for an abortion), makes inquiry concerning any questions the patient may have and performs a thorough pelvic examination. 479 F. Supp. at 1182. If the doctor at any time during

this process detects a note of hesitancy or ambivalence with respect to the abortion procedure he will "suggest that [the patient] return at another time after she [has] had some additional time to consider alternatives to abortion." 479 F. Supp. at 1182 (J.A.148-149, 175, 221, 515, 593, 609).

Section 1870.06(C) has the effect of overriding the physician's choice concerning counseling. It forces the attending physician to carry out all phases of pre-abortion counseling whether or not, in his professional judgment, he is the best one to perform the task.

Section 1870.06(c) also has the effect of substantially increasing the cost of abortions in Akron. (J.A. 222-224, 495, 516) When coupled with the twenty-four hour delay provision of the ordinance, Section 1870.06(C) may require that the same physician see each woman on

at least two occasions twenty-four hours apart[14] thereby multiplying operating expenses dramatically. (Id.) The burden imposed by Section 1870.06(C) is exacerbated by the fact that there are very few physicians who perform abortions in Akron, Ohio. The few physicians who do perform abortions have only been willing to devote a limited amount of their professional time to work in the clinics. (J.A. 116, 222-224, 458, 521) A substantial increase in the time required of each physician is likely to lead to the shutdown of the clinics or a substantial increase in their operating cost. (Id.)

14. The question of when the physician must speak the words mandated by Section 1870.06(C) is not free from doubt. This "vagueness" is an additional defect of the section and is discussed at note 5 supra.

4. The evidence overwhelmingly supports the circuit court's holding that Section 1870.07 mandating a twenty-four delay, burdens women seeking abortions in Akron, Ohio.

Section 1870.07 of the Akron ordinance imposes at least a twenty-four hour delay between the time a woman signs a mandatory consent form and the performance of the abortion procedure. Although the District Court found this burdened women needing abortions, it upheld the requirement under a rational basis test.[15] 479 F. Supp. at 1204-1205. The Sixth Circuit, consistent with the three other Circuits that have addressed this issue (see Point II, infra), reversed, holding that the requirement was neither supported by a compelling state interest, nor narrowly tailored. 651 F.2d at 1208.

15. The District Court found that delay will increase costs and will force each woman to make at least two trips to the clinic, with attendant travel, child care, and work loss expenses. 479 F. Supp at 1204-1205 (Appendix 98a).

The evidence demonstrated that twenty-four hours is the minimum delay caused by Section 1870.07. In most cases the delay will be for longer, because Akron clinics perform abortions only three days a week, and specialized procedures involving anesthesia only once a week. (J.A. 139, 156, 222-224, 226-228, 495, 521) Delays of from two to seven days will be the norm. (Id.) The evidence indicated that these delays will expose women seeking abortions in Akron to serious increases in morbidity and mortality risks (J.A. 107, 116, 305-306), and can also cause serious psychological harm. (J.A. 115-117, 368-369) Imposing an unwaivable delay on victims of rape was described by the witnesses as perhaps the most serious psychological problem, however delay will cause injury in other cases as well. (Id.)

REASONS WHY THE PETITION SHOULD NOT BE GRANTED

I. DEFENDANTS HAVE PREVIOUSLY CONCEDED THE UNCONSTITUTIONALITY OF ORDINANCE SECTIONS REGULATING MINORS AND IMPOSING VARIOUS RESTRICTIONS ON THE INFORMED CONSENT DIALOGUE

Despite the District Court ruling that Section 1870.05(B) (veto and notification) was unconstitutional, the defendants neither briefed nor argued the constitutionality of that section in the Sixth Circuit Court of Appeals. The Court of Appeals found that defendants had not appealed the ruling against them on this issue. 651 F.2d at 1205. Under these circumstances defendants have waived the right to argue the constitutionality of Section 1870.05(B) before this Court. See California v. Taylor, 353 U.S. 553, 556-557 n. 2 (1957).

Further, defendants in their brief to the Court of Appeals on February 28,

1980, specifically conceded that subsections (3), (4), and (5) of Section 1870.06(B) (mandating the recital of a 44 line script) were unconstitutional. Defendants requested that the Court of Appeals "sever the unconstitutional subsections [(3), (4) and (5)] of Section 1870.06(B)." Defendants' Brief to the Court of Appeals dated February 28, 1980 at 35. Defendants now attempt to retract this admission by arguing in their petition that all of Section 1870.06(B) is constitutional. Pursuant to California v. Taylor, this argument is improper and defendants are barred from urging the opposite of what they conceded in the court below.

II. THE DEFENDANTS AND INTERVENORS PRESENT NO SPECIAL AND IMPORTANT REASONS FOR THE GRANTING OF REVIEW

Rule 17 of this Court's Rules delineates "considerations governing review on certiorari." Defendants and

intervenors fail to make any reference to Rule 17, and in fact present no reason for the granting of review cognizable under Rule 17.

A. There Is No Conflict Between the Decision in the Present Case and Any Decision of Another Court of Appeals

Defendants and intervenors do not claim that certiorari should be granted because of a conflict between the ruling in the present case and the decision of another Circuit Court of Appeals. See Supreme Court Rule 17(a).In fact, the decision in this case is consistent with those in all the Circuits that have ruled on the issues.

In the past two years three Circuits besides the Sixth Circuit have reviewed statutes containing abortion restrictions almost identical to four of the five restrictions that defendants and intervenors are requesting this Court

review.[16] Charles v. Carey, 627 F.2d 772 (7th Cir. 1980) (Charles); Planned Parenthood League of Massachusetts v. Bellotti, 641 F.2d 1006 (1st Cir. 1981) (Planned Parenthood League); Planned Parenthood Association of Kansas City v. Ashcroft, 655 F.2d 848 (8th Cir. 1981) (Ashcroft); see also Wynn v. Carey, 582 F.2d 1375 (7th Cir. 1978); 599 F.2d 193 (7th Cir., 1979); Womens Services, P.C. v. Thone, 636 F.2d 606 (8th Cir. 1980), reversed and remanded ____ U.S. ____, 69

16. Section 1870.16 ("humane" disposal) was held unconstitutional by both the District and Circuit Courts because its wording was "impermissibly vague" for a criminal statute. 479 F. Supp. at 1206; 651 F.2d at 1211. No other circuit has addressed this question although a textually similar Pennsylvania "enabling statute" was not held to be burdensome in Planned Parenthood Association v. Fitzpatrick, 401 F. Supp. 554 (E.D. Pa. 1975), aff'd sub nom. Franklin v. Fitzpatrick, 428 U.S. 901 (1976). The distinctions between the present case and Fitzpatrick will be discussed at Point II C. infra.

L. Ed.2d 414 (1981). The Circuit Courts have agreed not only about the unconstitutionality of similar sections; they have also agreed on the constitutional standard of review to be used pursuant to the requirements of Roe v. Wade, 410 U.S. 113 (1973).

The standard of review used by the Circuits requires the court first to determine whether a state regulation directly interferes with the ability of the woman, with her doctor, to make or effectuate the abortion decision. If such interference is found, the state has the burden of justifying the regulation by showing a compelling interest. If a compelling state interest is established, the regulation must be further examined to determine whether it is sufficiently narrowly drawn so that it does not impose an "undue burden." See

Akron Center for Reproductive Health v. City of Akron, 651 F.2d at 1202-1204 (Akron Center); Charles, 627 F.2d at 776-778; Planned Parenthood League, 641 F.2d at 1014-1016; Ashcroft, 655 F.2d at 855.

Each of the four Circuits has concluded that a state-mandated waiting period is burdensome and supported by no compelling interest. See Akron Center, 651 F.2d at 1208; Charles, 627 F.2d at 785-786; Planned Parenthood League, 641 F.2d at 1014-1016; Ashcroft, 655 F.2d at 866. Each of the four Circuits has also invalidated as burdensome, state-mandated intrusions into the informed consent dialogue between the physician and pregnant patient. See Akron Center, 651 F.2d at 1206-1207; Charles, 627 F.2d at 779-784; Planned Parenthood League, 641 F.2d at 1016-1022; Ashcroft, 655 F.2d at

866-869. (The cases contain minor variations based primarily upon differences in the statutes under consideration or upon the vagaries of the factual showing made in each case.) Finally, three of the four Circuits have agreed with respect to the unconstitutionality of regulations which provide no alternative to mandatory parental notification or consent.[17] See Akron Center, 651 F.2d at 1205; Planned Parenthood League, 641 F.2d at 1009-1011; Ashcroft, 655 F.2d at 857-859. (In Akron Center and Ashcroft this led to invalidation. In Planned Parenthood League the statute provided an alternative and was upheld.)

17. The Seventh Circuit had previously invalidated a "veto and notification" requirement for minors in Wynn v. Carey, 582 F.2d 1375 (7th Cir. 1978).

B. The Decision of the Court of Appeals Is Consistent with the Decisions of This Court

1. The standard of review used by the Sixth Circuit is consistent with the standard of review of this Court

Defendants and intervenors distort the standard of review used by this Court in assessing abortion restrictions. They propose that the proper standard is that every abortion regulation should stand if the plaintiffs do not come forward and prove that the regulation "unduly burdens" a woman's right to choose abortion. This proposal would not only overturn the standard established in Roe v. Wade, but would also make judicial scrutiny in cases involving abortion restrictions radically different from

scrutiny in cases involving every other fundamental constitutional right.

This Court has consistently adhered to the position it first established in Roe v. Wade, that state interference which burdens the abortion decision is only permissible when the state has demonstrated a compelling interest justifying regulation. Roe v. Wade, 410 U.S. at 155, 162-163. This standard was affirmed in Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976), as well as the cases that have followed it. As this Court stated in Carey v. Population Services International, 431 U.S. 678 at 688 (1977), abortion regulations "'may be justified only by a compelling state interest ... and must be narrowly drawn to express only the legitimate state interests at stake.'"

Defendants place central reliance on Thone v. Womens Services P.C., ___ U.S.

___, 69 L.Ed.2d 414 (1981) an order vacating and remanding an Eighth Circuit decision. Defendants cite Thone no fewer than seven times in support of five of their seven arguments. Such reliance is misplaced because an order vacating and remanding a lower court decision is devoid of precedential authority. See Henry v. City of Rock Hill, 376 U.S. 776, 777 (1964).

Defendants also rely on Harris v. McRae, 448 U.S. 297 (1980), and Maher v. Roe, 432 U.S. 464 (1977). Again, defendants' reliance is misplaced. This Court specifically restated in Maher its adherence to the standards established in Roe v. Wade. See Maher v. Roe, 432 U.S. at 475. Maher distinguishes "between direct state interference with a protected activity and state encouragement of an alternative activity." Id. It applies a relaxed

constitutional test only in the latter situation. Id. at 476-477. Harris v. McRae, reaches precisely the same result. It declares that "if a law 'impinges upon a fundamental right ... [it] is presumptively unconstitutional'". Harris v. McRae, 448 U.S. at 312.

Finally, defendants seek to rely on decisions by this Court considering restrictions on the availability of abortions to minors. See Bellotti v. Baird, 428 U.S. 132 (1976) (Bellotti (I)); Bellotti v. Baird, 443 U.S. 622 (1979) (Bellotti (II)); and H.L. v. Matheson, 450 U.S. ___, 101 S. Ct. 1164 (1981). The requirements of these cases with respect to the law governing minors will be discussed at Point II B 2 infra. At this point, it should simply be noted that it is erroneous to use these cases as support for abortion regulations

governing adult women. In Planned Parenthood of Missouri v. Danforth, 428 U.S. at 74, this Court stated "the State has somewhat broader authority to regulate the activities of children than of adults." See Bellotti(II), 443 U.S. at 633-634; Carey v. Population Services International, 431 U.S. 678 (1977).[18]

2. The Court of Appeals' ruling is consistent with this Court's decisions concerning regulations restricting the availability of abortions to minors

The Court of Appeals in the present case invalidated Akron Ordinance Section 1870.05(B), which requires parental or

18. In Carey v. Population Services International, this Court held that restrictions on access to contraceptives by adults must be supported by a compelling state interest. 431 U.S. at 690. This Court further held, citing Planned Parenthood of Missouri v. Danforth, that, as to restrictions on minors, the test is "less rigorous than the 'compelling state interest' test applied...[to] adults," and significant state interests were sufficient. 431 U.S. at 693 fn. 15.

judicial consent and cedes to parents or judicial officers an absolute veto whenever women under fifteen years of age seek abortions. Neither in Chapter 1870 nor in Ohio Revised Code Chapter 2151 is there any provision allowing "best interests" or "mature" minors to get an abortion. Both the District Court, 479 F. Supp. at 1201, and the Court of Appeals, 651 F.2d at 1205, concurred in the finding that an absolute veto requirement is imposed pursuant to Section 1870.05(B).

In Planned Parenthood of Missouri v. Danforth, this Court held "that the State may not impose a blanket provision ... requiring the consent of a parent or person in loco parentis as a condition for abortion of an unmarried minor during the first twelve weeks of pregnancy." 428 U.S. at 74. This proposition was

reiterated in Bellotti v. Baird (II), when eight Justices of this Court agreed that an absolute veto is impermissible. See 443 U.S. at 643 (Opinion of Powell, J.); 443 U.S. at 653-654 (Opinion of Stevens, J.). Akron Ordinance Section 1870.05(B) authorizes a blanket veto and was properly held unconstitutional. (Chapter 1870 was drafted long before this Court's decision in Bellotti v. Baird (II), and is not informed by the principles announced in that opinion.)

Further, Section 1870.05(B) is unconstitutional because there is no way any minor can bypass parental notification. Once a complaint has been filed in a juvenile court in Ohio, notice must be provided to the parents of the child involved in the proceeding. See Ohio Revised Code Chapter 2151. Intervenors specifically admitted this

fact during the pendency of this action and the District Court took special notice of their admission. 479 F. Supp. at 1201. In Bellotti v. Baird (II), Justice Powell, writing for four Justices of this Court, concluded that a blanket parental notice requirement is unconstitutional. See 443 U.S. at 642-648. In H. L. v. Matheson, at least five Justices of this Court concurred in the proposition that "a State may not validly require notice to parents in all cases." See 101 S.Ct. at 1176-77 (Concurring Opinion of Powell, J.); 101 S.Ct. 1184-1194 (Dissenting Opinion of Marshall, J.). Upon the strength of these precedents the Court of Appeals for the Eighth Circuit invalidated a blanket notication requirement in Ashcroft. See 655 F.2d at 859.

3. The Court of Appeals' ruling is consistent with this Court's rulings concerning regulations interfering with the abortion decision-making process

This Court has consistently stressed the importance of respect for the professional judgment of the physician in the abortion context. In Planned Parenthood of Missouri v. Danforth, this Court permitted the states to require that the woman give her "informed consent" before an abortion is performed. See 428 U.S. at 65-67. However, Danforth specifically limited "informed consent' by construing it to mean

> the giving of information to the patient as to just what would be done and as to its consequences. To ascribe more meaning than this might well confine the attending physician in an undesired and uncomfortable straitjacket in the practice of his profession.

Id. at 67, n. 8. In Colautti v. Franklin, 439 U.S. 379, 387 (1979) this Court found that "up to the points where important state interests provide compelling justifications for intervention 'the abortion decision in all its aspects is inherently and primarily a medical decision.'"[19]

Chapter 1870 impermissibly straitjackets the physicians in the practice of their profession. First, the Chapter requires a written consent form of the sort authorized in Danforth.

19. Consistent with these principles is this Court's affirmance of the decision of the Eighth Circuit in Freiman v. Ashcroft, 584 F.2d 247 (8th Cir. 1978) aff'd 440 U.S. 941 (1979). There the Circuit Court invalidated a regulation compelling the physician to tell each woman that any live-born infant resulting from an attempted abortion would become the ward of the state. The Eighth Circuit condemned the regulation because it interjected "irrelevant and extraneous" material into the informed consent dialogue and jeopardized the physician-patient relationship. Freiman v. Ashcroft, 584 F.2d at 251-252.

(Section 1870.06(A)--not challenged here.) The Chapter goes on from there to establish an inflexible rule that the attending physician personally in all cases, recite a 44 line statement including inaccurate, biased, and irrelevant material including the statement that the "unborn child is a human life from the moment of conception." (Section 1870.06(B)) The ordinance next requires that in all cases, the "attending physician" separately recite (at some inadequately defined time) details about risk and procedure. (Section 1870.06(C)) Finally, the ordinance inflexibly mandates that all abortions be delayed at least twenty-four hours. (Section 1870.07) Any deviation from this procedure exposes the physician to criminal liability, including a jail sentence and possible loss of license.

Not only are these restrictions a straitjacketing of the physician, they are also fundamentally incompatible with the doctrine of informed consent which seeks to preserve the physical and psychological integrity of the patient by allowing her (rather than the state) a significant degree of control over the treatment process.[20]

20. For a discussion of the doctrine of informed consent see J. Katz, EXPERIMENTATION WITH HUMAN BEINGS, 540-588 (1972). Pursuant to the doctrine of informed consent there are two situations in which information should not be pressed upon a patient. The first of these involves the patient's specific request not to be informed. See Cobbs v. Grant, 8 Cal.3d 229, 502 P.2d 1 (1972); Ohio Sanitary Code Section 3701-47-06 (referring specifically to second trimester abortions). The second arises when the physician specifically determines that the recital of information will be harmful and exercises a therapeutic privilege not to provide it. See Canterbury v. Spence, 464 F.2d 772 (D.C. Cir. 1972).

C. A Number of the Questions Presented by Defendants Are of No General Importance

Defendants complain about the failure of the District Court and the Court of Appeals to redraft various sections of Chapter 1870 (Sections 1870.06(B) and 1870.16) by severing allegedly constitutional fragments from unconstitutional material. Determinations about severability made by district courts will not be upset without a showing of good reason therefore. See Sloan v. Lemon, 413 U.S. 825, 834 (1973).

In the present case both the District Court and the Court of Appeals passed upon the question of severability. Each determined that judicial redrafting of the arguably constitutional bits and pieces of invalid sections of Chapter 1870 was inappropriate. In similar circumstances the Sixth Circuit has previously held it inappropriate for a court to "untangle the constitutional provisions from the unconstitutional ... by attempting to rewrite the minor provisions of the ordinance." Mahoning Women's Center v. Hunter, 610 F.2d 456, 460-461 (6th Cir. 1979), vacated and remanded on other grounds, 447 U.S. 918 (1980). Defendants have not satisfied the requirements of Sloan v. Lemon, nor have they demonstrated that the sections could have or should have been untangled and rewritten. Finally, the question whether minor fragments of the ordinance

should have been judicially redrafted can hardly be said to be of any general significance, and is, therefore, not a subject fit for review. See Magnum Import Co.v. Coty, 262 U.S. 159, 163 (1923).

Defendants appear to claim that the question of the vagueness of the word "humane" as used in Section 1870.16 (a criminal ordinance) is a fit question for the plenary consideration of this Court. Both the District Court and the Court of Appeals have rejected defendants' arguments. Further, this Court's ruling in Colautti v. Franklin, applies because the word "humane" is, in this context, "little more than a trap for those who act in good faith." 439 U.S. at 395. Defendants' only argument is that the present decision is inconsistent with that in Planned Parenthood v. Fitzpatrick, 401 F. Supp. 554 (E.D. Pa.

1975) aff'd sub nom. Franklin v. Fitzpatrick, 428 U.S. 901 (1976). This assertion is erroneous. Fitzpatrick reviewed nothing more than an "enabling statute" pursuant to which regulations had not as yet been adopted. 401 F. Supp. at 572-573. As indicated in Winters v. New York, 333 U.S. 507 (1947), enabling statutes are to be judged by a different standard than statutes directly regulating conduct. Further, as with the question of severability, it can hardly be said that the question defendants present is so important as to warrant this Court's review. See Magnum Co. Import v. Coty, 262 U.S. at 163.

III. REVERSAL OF THE DECISION OF THE COURT OF APPEALS WOULD LEAD TO CONFUSION IN THE DETERMINATION OF CASES INVOLVING ABORTION REGULATION AND WOULD PROMOTE AD HOC ADJUDICATION

There is remarkable agreement within the Circuits concerning regulations

restricting access to abortions. The clarity of the principles upon which decisions are now being rendered has produced this high degree of decisional uniformity. The announcement of a new and different set of standards by this Court could serve to introduce uncertainty where none now exists.

The greatest source of uncertainty would be the sort of "standardless" due process test advocated by the defendants and intervenors. Adoption of such a test would mean nothing more nor less than unstructured district court review premised upon an ad hoc search for "reasonableness" in each case. See Charles v. Carey, 627 F.2d at 778. The variety of results and conflicts that would arise would be extensive. In a different area this Court has declared that such ad hoc adjudication "would lead to unpredictable results and uncertain

expectations and it could render our duty to supervise the lower courts unmanageable." Gertz v. Robert Welch, Inc., 418 U.S. 323, 343 (1974).

IV. THE LAPSE OF TIME HAS RENDERED INTERVENORS' CLAIMS MOOT

At trial intervenor Seguin testified that he had a fourteen year old daughter and another daughter of unspecified age. (Transcript Volume VII at 49) Intervenor Black testified that she had a fourteen year old daughter. (J.A. 499) Each of the described daughters is now at least seventeen years of age. Neither intervenor provided any information on the record about any other daughters. The focus of intervenors' Petition is Section 1870.05(B) of the Akron Ordinance which applies only to "minor pregnant [women] under the age of fifteen (15) years." It would appear, based on the record in this case, that the lapse of

time has rendered intervenors' claims moot.

In Atherton Mills v. Johnston, 259 U.S. 13 (1922), both a parent and a child filed suit to challenge the constitutionality of the Child Labor Tax Act which placed limits on the hours worked by a child under sixteen years of age. During the pendency of the litigation the child passed his sixteenth birthday. This Court, per Chief Justice Taft, held that the "lapse of time" had rendered the case moot. Atherton Mills v. Johnston, 259 U.S. at 15. The Court so held with respect to the independent action of the parent as well as the action of the minor.

Where, as here, no class has been certified and a litigant has no continuing interest in the action, his claims must be dismissed as moot. See Atherton Mills v. Johnston; Indianapolis

School Commissioners v. Jacobs, 420 U.S. 128 (1975); DeFunis v. Odegaard, 416 U.S. 312 (1974). The major exception to this rule involves cases that are "capable of repetition yet evading review." In Weinstein v. Bradford, 423 U.S. 147 (1975), this Court defined such cases as those in which it is "virtually impossible" to litigate in the time before the occurrence of the mooting event and in which the same party faces the identical problem in the future. Id. at 149. Here, intervenors have satisfied neither part of the Weinstein test. Any number of parents might be found who could establish on the record a continuing interest stretching over many years. Intervenors have not established such an interest. Under these circumstances intervenors claims should be dismissed as moot.

As a final matter it should be noted that intervenors were allowed to proceed in this case only for the purpose of advancing claims touching on Section 1870.05 of the Akron Ordinance and perhaps those subsections of 1870.06 brought into play because of Section 1870.05.[21] Pursuant to this Court's ruling in Boston Tow Boat v. United States, 321 U.S. 632 (1944), intervenors may only appeal those questions directly arising out of an "appealable interest." Here intervenors' interest has been rendered moot and no appeal is appropriate.

21. See note 4 supra.

CONCLUSION

For the foregoing reasons the petitions for a writ of certiorari should be denied.

Dated: Cleveland, Ohio
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Respectfully submitted,

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